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# Mutual Recognition and the European Court of Justice: The Meaning of Consistent Interpretation and Autonomous and Uniform Interpretation of Union Law for the Development of the Principle of Mutual Recognition in Criminal Matters

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## 1. Introduction

Since the Tampere European Council, now ten years ago, hard work has been done within the third pillar of the European Union (EU) on innovation or, rather, streamlining of the legal assistance relationships between the Member States. This process is being completed along two lines. First of all, the traditional legal assistance system, in which States render legal assistance on *request*, has been transformed into a system of mutual recognition. The idea behind the principle of mutual recognition is that the European Member States are to a great extent *required* to render assistance to one another. This means that – ideally – few or no grounds for refusal may exist. This is partly intended to allow the necessary procedures to be standardised and run quickly. The second innovation is closely connected with this: within the EU, legal assistance is arranged mainly by means of framework decisions. A framework decision – in view of its definition in Article 34(2)(b) of the EU Treaty – gives rise to the obligation for the Member States to adjust their national legislation in accordance with the contents of the framework decision. Cooperation between the Member States based on the principle of mutual recognition is realised primarily through harmonisation of legislation.

Such cooperation based on the principle of mutual recognition is designed at different levels. First of all, framework decisions are adopted at European level by the Council, in which the procedures to be followed for the different forms of



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cooperation are worked out in more detail. The principle of mutual recognition is, of course, the main guideline in this regard. Although it cannot be denied that compromises are made during the negotiation process, for example on accepting or adding grounds for refusal, which are sometimes at odds with that principle. The effect of this is, in the words of Mitsilegas, 'the substantial watering down of automaticity in mutual recognition', even though this has a positive reverse side at the same time:

> The paradox in this context is that scepticism with regard to mutual recognition as an effective method of European integration in criminal matters has been accompanied by the reach of the principle in an ever wider range of aspects of the domestic criminal justice systems, which now include evidence, probation and alternative sanctions and the transfer of sentenced persons.[1]

In other words: precisely by not considering the principle of mutual recognition a rigid dogma now and then, it appears possible to allow the scope of application of that principle to grow.

Adoption of the framework decision is followed – self-evidently – by the process of implementation at national level. Framework decisions are binding on the Member States with respect to the results, but the power is left to the Member States to chose the form and means (according to Article 34(2)(b), EU Treaty). This may well limit the freedom the Member States have to implement framework decisions, but in practice the situation can easily occur that certain differences arise in the implementation rules of the different Member States.[2] Those differences can arise, for example because a term in a framework decision is 'translated' into an equivalent term in national law, but also because Member States include conditions that cannot explicitly be found in a framework decision. An example of this is the inclusion of a human rights exception in legislation to implement the European Arrest Warrant (EAW) framework decision. Even if it is explicitly provided that the framework decision does not diminish the obligation to respect fundamental rights and fundamental legal principles, such a human rights exception is not explicitly considered a ground for refusal in the framework decision. So it is doubtful whether a Member State has an independent power to do so.

In applying the national rules by which framework decisions are transposed, national courts are required – as ensues from the Pupino judgment[3] – to apply

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1) V. Mitsilegas, 'The third wave of third pillar law: which direction for EU criminal justice?', *European Law Review* 2009, pp. 523–560, at p. 560.

2) Cf. M.J. Borgers, 'Implementing Framework Decisions', *Common Market Law Review* 2007, pp. 1361–1386.

3) ECJ, Case C-105/03, *Pupino*, [2005] ECR I-5285.

the national law as far as possible in conformity with the relevant framework decision. In that context, the competence to request the European Court of Justice (ECJ) to give a preliminary ruling is very important. Whether national courts have competence to do so, and if so, which national court is entitled to such competence, depends on whether or not a declaration was made within the meaning of Article 35(2) EU Treaty. By preliminary ruling, the ECJ can give an interpretation of (among others) the rules pertaining to mutual recognition as laid down in the various framework decisions. In giving its preliminary rulings, the ECJ directs the way in which the national courts apply the implementation legislation in their Member State. In this way, the ECJ potentially plays an important role in the development of the principle of mutual recognition in criminal matters.

This paper centres on the question of the way in which the ECJ gives shape to this role. It should be noted first of all in this regard that the number of cases in which the ECJ has ruled on issues relating to mutual recognition in criminal matters has been small up to now. The cases at hand nevertheless give a relatively clear idea of how the ECJ construes its role in these cases. In the following, I will deal first in a more general sense with the obligation to interpret national legislation in conformity with framework decisions (Section 2) and with the meaning of the concept of uniform and autonomous interpretation in explaining Union law (Section 3). I will then discuss the case law of the ECJ on the *ne bis in idem* principle of Article 54 CISA (Section 4) and on the term 'staying' in Article 4(6) of the EAW Framework Decision (Section 5). Consecutively, I will illustrate the importance of the case law of the ECJ on the basis of a Dutch case in which the issue was brought up concerning the extent to which the competent Dutch authorities may require that the text or a translation of the text of the applicable statutory provisions must be enclosed with a European arrest warrant (Section 6). Finally, I will end with several conclusions and – in view of the Treaty of Lisbon – an outlook for the near future (Section 7).

## 2. Conforming Interpretation

The definition of the framework decision in Art. 34(2)(b) of the EU Treaty is for the most part in line with the definition of this legal instrument in Art. 249(3) of the EC Treaty. Framework decisions and directives are binding as to the result but leave the power to choose the form and methods to the national authorities. A difference between the two definitions is that Art. 34(2)(b) of the EU Treaty has an addition which is absent in Art. 249(3) of the EC Treaty. This addition reads: 'They [read: framework decisions] shall not entail direct effect.' The drafters of the EU Treaty made this addition so the case law of the ECJ on the direct effect of directive provisions implemented late, incorrectly or not at all would not apply

to framework decisions. This expresses what the drafters viewed as the intergovernmental, non-community nature of the third pillar. Somewhat less clear, but absolutely plausible, is that the Member States have also wanted to keep out the indirect effect of framework decisions in the form of conforming interpretation.

In the aforementioned Pupino judgment, the ECJ – notwithstanding the above-mentioned intention of the Treaty signatories – accepted the obligation to interpret national legislation in conformity with framework decisions. The ECJ puts forward four arguments to this effect: the similarity between treaty law definitions of directives and framework decisions; the useful effect of the preliminary ruling procedure under Art. 35 EU Treaty; the development of the European Union into a cohesive and solidary organization; and the principle of loyal cooperation this judgment introduced for the third pillar. It would be going too far to subject the arguments of the ECJ to a more detailed analysis here, but one may note that the Pupino judgement was very important in characterising the legal nature of the third pillar. The ECJ gives the third pillar an autonomous nature in this judgment, through which the third pillar law has effect in the national law of the Member States under its own conditions. This judgment in fact preludes the predominantly community regime as laid down in the Treaty of Lisbon for police and judicial cooperation in criminal matters.

In giving the Pupino judgment, the ECJ sought to be in line with the already much longer existing doctrine of interpretation in conformity with directives. Partly in view of the case law on the interpretation of national law in conformity with directives, roughly four characteristics of the obligation of consistent interpretation can be distinguished, whether the interpretation of directives or framework decisions is concerned. The first is the *obligation* of consistent interpretation. If a provision of national legislation is within the scope of application of a directive or framework decision, the court must interpret that provision in conformity with that directive or framework decision. This also means, and this is the second characteristic, that the court must use the interpretation methods customary in its national law in such a way that the result intended by the directive or framework decision is achieved. This could mean that the court must interpret in a way that is not supported by or is even at odds with the legislative history.[4] Thirdly, the obligation of consistent interpretation is not limited to provisions by which a directive or framework decision has been transposed, but extends to the whole of national law. Even a provision that has already existed for a longer time must be interpreted consistently if it falls within the scope of application of a subsequently

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4) ECJ, Case C-371/02, *Björnekulla Fruktindustrier*, [2004] ECR I-5791; ECJ, Case C-379/01 to C-403/01, *Pfeiffer et al.*, [2004] ECR 2004 I-8835.

adopted directive or framework decision. The fourth characteristic is the limitation of the obligation of consistent interpretation. The court is not obliged to interpret national law *contra legem* in order to achieve the result intended by a directive or framework decision. In Community law and Union law, legal certainty and non-retroactivity must be respected. However, these principles do not automatically prevent an extensive interpretation of national law in order to arrive at a consistent interpretation.[5]

This outline of the characteristics of the obligation of consistent interpretation makes it clear that national courts play an important part in the realization of European law. It also demonstrates the importance of requesting and giving preliminary rulings by the ECJ. In this way, a more detailed interpretation is given to the relevant provisions of European rules and regulations that are of decisive importance for the application of national legislation.

## 3. Uniform and Autonomous Interpretation

The ECJ uses different interpretation methods in its case law in interpreting European law.[6] Literal and contextual interpretation of provisions of European legislation plays a dominant role in this respect. This means that the ECJ rarely pays attention to the legislative history of provisions,[7] but concentrates on the uniform and autonomous meaning of the relevant rules and regulations. This approach is evident from the judgment in the Kozłowski case.[8] In this case, the ECJ interpreted one of the provisions of the EAW Framework Decision for the first time. This was Article 4(6) of the EAW Framework Decision, which includes an optional ground for refusal of surrender for the purpose of executing a custodial sentence. If an EAW is issued for the purpose of executing a custodial sentence or detention order, surrender may be refused if the requested person 'is staying in, or is a national or a resident of' the executing Member State, and this State undertakes to execute the sentence or detention order itself. The specific question was put before the ECJ of when a person is 'staying' in a Member State and when a person is a 'resident'.

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5) ECJ, Case C-321/05, *Kofoed*, [2007] ECR I-5795.

6) For an overview see André Klip, *European Criminal Law. An Integrative Approach*, Antwerp/Oxford/Portland: Intersentia 2009, pp. 135–147.

7) S. Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent*, Band I, Tübingen: Mohr Siebeck 2001, pp. 346–349; S. Schønberg & K. Frick, 'Finishing, Refining, Polishing: on the Use of Travaux Préparatoires as an Aid in the Interpretation of Community Legislation', *European Law Review* 2003, pp. 149–171.

8) ECJ, Case C-66/08, *Szymon Kozłowski*, [2008] ECR I-6041.

After an initial exploration of the terms 'staying' and 'resident', the ECJ emphasised that the definition of these terms cannot be left to the judgment of each Member State. In doing so, the ECJ used a generally formulated ground: because of the uniform application of Union law and the principle of equal treatment, an autonomous and uniform interpretation must be given to the wording of provisions of Union law, in so far as those provisions do not refer to national law for further interpretation. When such an autonomous and uniform interpretation is given, account should be taken of the context of the relevant provision and the purpose of the rules and regulations concerned. This is a notable ground, in the sense that the ECJ almost literally falls back on case law on the interpretation of terms in directives. In different language versions, only 'Community law' is replaced by 'Union law'. In the English version of the Kozłowski judgment, 'Community law' is still written instead of 'Union law'. The ECJ does not explain why the same applies to framework decisions as to Community directives. But this step is not surprising. This does not only have to do with the far-reaching equation of the legal instruments framework decision and directive in the Pupino judgment. It also has to do mainly with the function of the preliminary ruling procedure in Third Pillar law: the preliminary ruling procedure is intended to guarantee a uniform application of Union law. The obligation to interpret national legislation in conformity with framework decisions, as accepted in the Pupino judgment, would not amount to much if no uniform interpretation could be given to rules of framework decisions.[9]

In the Kozłowski case, the ECJ worked out the starting point of autonomous and uniform interpretation in more detail in relation to (Article 4(6) of) the EAW Framework Decision. It comes down to the fact that the surrender system as laid down in the EAW Framework Decision is based on the principle of mutual recognition and is therefore largely obligatory in nature. Not surrendering is possible only on the basis of the limitative grounds for non-execution included in the framework decision. Should it be left completely up to the Member States to give shape to the terms 'staying' and 'resident', which are part of an optional ground for refusal, that ground for refusal could have divergent meanings in the different Member States. This would impede the effectiveness of the surrender system. For that reason, the Member States are not authorised to give a broader interpretation of terms with a uniform meaning. I will return to this in section 5.

It is remarkable, for that matter, that the ECJ mentioned 'Member States' without reservation, by which the ECJ apparently expressed that all Member

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9) S. Peers, 'Mutual recognition and criminal law in the European Union: has the Council got it wrong?' *Common Market Law Review* 2007, p. 916.

States are bound by the uniform interpretation given to Article 4(6) of the EAW Framework Decision. The Pupino judgment gave rise to the question whether the judicial authorities of the Member States which did *not* accept the possibility under Article 35(2) of the EU Treaty to submit preliminary enquiries are also required to interpret their legislation in conformity with framework decisions and are thus bound by the uniform meaning of terms in framework decisions.[10] The Pupino judgment in fact already contains the answer to this question. In it, the ECJ referred to 'the binding nature of framework decisions', entailing that national judicial authorities must interpret national law in conformity with them, without differentiating according to whether a declaration within the meaning of Article 35(2) of the EU Treaty was made or not. In the Pupino judgment, the ECJ pointed out further that all Member States, whether or not they had made such declarations, are entitled to file statements or written comments with the Court of Justice. The ECJ elaborates this line of reasoning in the Kozłowski judgment by assuming that the Member States are bound by the uniform meaning of Article 4(6) of the EAW Framework Decision. What is more, the obligation of the judicial authorities of the Member States to interpret national law as far as possible in conformity with the wording and purposes of framework decisions and, in doing so, to focus on the uniform meaning of terms in framework decisions actually results in an *erga omnes* effect of preliminary rulings. Consequently, the rule in Article 35(2) of the EU Treaty only says something about the competence of the national courts to request preliminary rulings, and nothing about their being bound by Union law.[11]

## 4. *Ne bis in Idem*

A good illustration of the fact that the ECJ pays hardly any attention to the legislative history of provisions but focuses on the uniform and autonomous meaning of the relevant rules, is given in the ECJ case law on Article 54 of the CISA. This concerns the rule that persons convicted of an offence by a final judgment in one Member State cannot be convicted of the same offence again in another Member State. In the legislative history of this provision, one Member State (the Netherlands) proposed to have the *ne bis in idem* rule also apply to out-of-court-settlements by the prosecution. That proposal, however, was rejected at the time by other Member States involved in drafting the CISA. Viewed in this way, Article 54 of the CISA only relates to final *court* judgments.

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10) Ch. Herrmann, 'Gemeinschaftsrechtskonforme Auslegung nationalen Rechts in Strafverfahren' *Europäische Zeitschrift für Wirtschaftsrecht* 2005, p. 438.

11) M. Pechstein, *EU-/EG-Prozessrecht*, Tübingen: Mohr Siebeck 2007, pp. 463–464.

In the Gözütok & Brügge case, further to the requests for preliminary ruling by Belgian and German Courts, the ECJ nevertheless decided that out-of-court-settlements did fall within the scope of application of Article 54 of the CISA. This decision is extensively reasoned. It is especially interesting here to point out that the ECJ explicitly links Article 54 of the CISA with the principle of mutual recognition. After the ECJ determined that the application of Article 54 of the CISA did not depend on harmonisation, at any rate bringing the criminal legislation of the Member States closer together in relation to the procedures for barring further prosecution, the ECJ held:

> In those circumstances, whether the *ne bis in idem* principle enshrined in Article 54 of the CISA is applied to procedures whereby further prosecution is barred (regardless of whether a court is involved) or to judicial decisions, there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied.

Against this background, the application of Article 54 CISA to procedures to bar further prosecutions which were followed in another Member State without the intervention of a court does not depend on the condition that the criminal justice system of the first Member State does not require judicial intervention either. In this regard, the ECJ makes an explicit connection with the free movement of persons. If persons want to exercise this right effectively, they must be able to trust that decisions on the final barring of prosecution will be respected by other Member States. The reliance by a few Member States on the intention of the Member States that drafted the CISA is brushed aside with few words. According to the ECJ, such reliance already fails because of the mere fact that the documents supposedly evidencing this intention '(…) predate the Treaty of Amsterdam's integration of the Schengen acquis into the framework of the European Union.'

In this brief consideration of the judgment in the Gözütok & Brügge case, I do not intend to criticise the ECJ's decision. On the contrary, precisely from the viewpoint of application of the principle of mutual recognition, a lot can be said in favour of a broad interpretation of the *ne bis in idem* principle in Article 54 of the CISA. It is in keeping with a Europe where the borders are being removed in the field of criminal law as well, and cooperation between the Member States in criminal matters is possible precisely because of this, that the legal protection of suspected or sentenced persons does not stop at the national borders. [12] The importance of

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[12] Cf. J.A.E. Vervaele, 'Case note', *Common Market Law Review* 2004, p. 809 and W.B. van Bockel, *The ne bis in idem principle in EU law*, Amsterdam 2009, pp. 71–72.

the judgment therefore lies in the fact that it demonstrates that the ECJ is willing to take the principle of mutual recognition – and related points of view such as the free movement of persons – as points of departure in the interpretation of Article 54 of the CISA, and does not allow itself to be limited by the intention, different to a certain extent, of the parties that drafted the CISA.

## 5. EAW: 'Staying' and 'Resident'

In 2008 and 2009, the ECJ deliberated twice – in respectively the Kozłowski and Wolzenburg cases – on requests for preliminary ruling essentially connected with an issue already brought up: the question of when a person is 'staying' in a Member State or is a 'resident', within the meaning of Article 4(6) of the EAW Framework Decision. In doing so, the ECJ also deliberated in the Kozłowski case on the uniform and autonomous interpretation of the terms 'staying' and 'resident'. In this context, the ECJ took as a starting point that:

> (…) it must be emphasised, (…) that the ground for optional non-execution stated in Article 4(6) of the Framework Decision has in particular the objective of enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires.

The terms 'staying' and 'resident' are interpreted further from this point of view of resocialisation. 'Staying', for instance, refers to the situation 'in which the person who is the subject of a European arrest warrant (…) has acquired, following a stable period of presence in that State, certain connections with that State which are of a similar degree to those resulting from residence.' Whether this is the case depends on various points of view:

> In order to determine whether, in a specific situation, there are connections between the requested person and the executing Member State which lead to the conclusion that that person is covered by the term 'staying' within the meaning of Article 4(6) of the Framework Decision, it is necessary to make an overall assessment of various objective factors characterising the situation of that person, which include, in particular, the length, nature and conditions of his presence and the family and economic connections which he has with the executing Member State.

Based on these points of view, the national court must decide whether 'staying' is involved in a specific case.

It is interesting that the ECJ noted that 'in their national law transposing Article 4(6), the Member States are not entitled to give those terms ['resident' and 'staying'; MJB] a *broader* meaning than that which derives from such a uniform interpretation.' Broader apparently means: an interpretation that leads to refusal

of surrender sooner than it would have resulted on the basis of a uniform and autonomous interpretation. By saying this, the ECJ seems to imply that the opposite, a stricter interpretation that does not as easily result in refusal, is allowed. But the question can be raised whether that is indeed the case.[13] The importance the ECJ attaches to reintegration in society and the overall assessment of various objective factors characterising the situation of the requested person give the impression in a certain sense that the court in the executing Member State may refuse to surrender a person for the purpose of execution only within this frame and may not derogate from that in any way. It could be argued further that it is actually incompatible with the importance of a uniform application of Union law and the principle of equal treatment to allow a different, stricter interpretation.

Arguments against this are, however, conceivable. First of all, it could be argued that the *optional* nature of the non-execution ground laid down in Article 4(6) of the EAW Framework Decision actually comes down to a power to derogate. After all, if the power exists to completely omit a right to refuse surrender for the purpose of execution, it is difficult to see why the application of a ground for non-execution which is stricter than the uniform and autonomous interpretation of that ground for non-execution should not be allowed. An objection could nevertheless be that, according to the first lines of Article 4 of the EAW Framework Decision, it is not the Member State itself but the executing judicial authority of the Member State that decides whether or not to apply an optional ground for non-execution. An argument can be found in this to assume rather that it is not the national legislature that has a power to derogate. It is, after all, the court which in a specific case, based on the uniform and autonomous meaning of the terms used in the non-execution ground, must consider whether or not to apply that non-execution ground.

There are even more relevant points of view and they too point in the direction of the discretion to give a stricter interpretation of the terms 'staying' and 'resident' which would not as easily lead to non-execution. According to the preamble, the framework decision is based on the principle of mutual recognition and is for the purpose of introducing a new and simplified system of surrender. The assumption is that European arrest warrants are to be executed, while non-execution depends on a limitative list of optional and mandatory grounds for non-execution. This is also expressed in other wording in the relevant legal bases (Article 31(1)(a and b) of the EU Treaty), which refers to 'facilitating and accelerating cooperation' and 'facilitating extradition'. A stricter interpretation, which would less easily lead to non-execution, is therefore not at odds with the purpose or the legal bases. This

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13) V. Glerum & K. Rozemond, 'Surrender of Nationals', in N. Keijzer & E. van Sliedregt (eds.), *The European Arrest Warrant*, The Hague: T.M.C. Asser Press 2009, pp. 83–84.

may well have been different if a significant place had been given in the preamble or otherwise to the importance of reintegration in society. In that case, such importance would have marked a clear boundary of the obligation to surrender, but it would also have been more logical to introduce a mandatory ground for non-execution. This is not altered by the way in which the ECJ formulates the rationale of Article 4(6) of the EAW Framework Decision in the Kozlowski judgment, precisely because that formulation ('in particular') expressed that the importance of reintegration in society is not the all-determining point of view. With this state of affairs, a stricter interpretation of Article 4(6) of the EAW Framework Decision seems to be allowed.

This issue was brought up as well in the Wolzenburg case.[14] Various preliminary enquiries are discussed in the judgment in this case. Regarding the debate over allowing a stricter interpretation of Article 4(6) of the EAW Framework Decision or not, the following grounds of the ECJ are important:

> 57 The principle of mutual recognition, which underpins Framework Decision 2002/584, means that, in accordance with Article 1(2) thereof, the Member States are in principle obliged to act upon a European arrest warrant. Apart from the cases of mandatory non-execution laid down in Article 3 of the Framework Decision, the Member States may refuse to execute such a warrant only in the cases listed in Article 4 thereof (…).
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> 58 It follows that a national legislature which, by virtue of the options afforded it by Article 4 of the Framework Decision, chooses to limit the situations in which its executing judicial authority may refuse to surrender a requested person merely reinforces the system of surrender introduced by that Framework Decision to the advantage of an area of freedom, security and justice.

It follow from this that the Member States have 'a certain margin of discretion' in executing Article 4 of the EAW Framework Decision. With respect to facilitating reintegration in society, the ECJ notes:

> (…) although the ground for optional non-execution set out in Article 4(6) of the Framework Decision has (…) in particular the objective of enabling the executing judicial authority to give particular weight to the possibility of increasing the requested person's chances of reintegrating into society when the sentence imposed on him expires (…), such an objective, while important, cannot prevent the Member States, when implementing that Framework Decision, from limiting, in a manner consistent with the essential rule stated in Article 1(2) thereof, the situations in which it is possible to refuse to surrender a person who falls within the scope of Article 4(6) thereof.'

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14) ECJ, Case C-123/08, *Wolzenburg*, n.y.r.

Briefly summarised, this means that an interpretation of Article 4(6) of the EAW Framework Decision which is stricter than the ECJ's interpretation of it in the Kozłowski case, and thus less easily leads to non-execution, is allowed.[15]

It can be noted that the ECJ devotes few words to the shift of accent made in the Kozłowski and Wolzenburg cases. While reintegration in society was the guideline in determining the autonomous and uniform interpretation of Article 4(6) of the EAW Framework in the former case, the first matter of importance in the latter case was that, in the light of the principle of mutual recognition, not applying this optional ground for non-execution, or applying it to a much lesser extent, is allowed. It is clear at any rate that the ECJ established a certain order of rank in these judgments: the importance of reintegration in society is not so compelling that it can block surrender, and is thus not an importance which, as it were, is higher in rank than the principle of mutual recognition.

## 6. EAW: Enclosing Statutory Provisions

It can be illustrated on the basis of a recent Dutch case that a national court, when it interprets national law in the light of a framework decision aimed at mutual recognition, can be guided by the uniform and autonomous interpretation of terms from that framework decision, with the principle of mutual recognition as a guideline. What was this case about? If a Member State issues an EAW, under Article 8(1)(d) of the EAW Framework Decision, that EAW must set out 'the nature and legal classification of the offence, particularly in respect of Article 2'. This Article 2 pertains to surrender on the basis of offences listed in the EAW. In the model EAW (section (e) of the annex to the EAW Framework Decision), not only the nature and legal classification of the offence must be set out, but also the applicable statutory provisions. The Dutch Surrender of Persons Act (*OLW*) refers to this model and provides in addition that an EAW must at any rate set out the nature and legal classification of the offence. So according to the letter of the framework decision and the Surrender of Persons Act, there is no obligation to submit the text of the applicable statutory provisions, in Dutch or translated into English.

In various judgments, the Amsterdam District Court (*Rechtbank Amsterdam)* nonetheless set the requirement that the texts of these statutory provisions indeed had to be submitted. The District Court used two connected arguments for setting this requirement: *i.* this requirement is explicitly mentioned by the government in parliamentary documents relating to the drafting of the Surrender of Persons

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15) See for another view on this issue the Opinion of Advocate-General Bot in the *Wolzenburg* case.

Act, and *ii.* the text of the framework decision does not prevent this requirement from being set. The fact that the District Court considered itself obliged to carry out checks also seems connected with the observation that every now and then an issuing Member State sets out incorrect information in an EAW.

The Dutch Supreme Court (*Hoge Raad*) put an end to such administration of justice by the Amsterdam District Court. It gave four essential reasons for doing so: *a.* the text of the framework decision does not contain that obligation, *b.* the government's position must be abandoned in the light of the obligation to interpret in conformity with framework decisions, as well as the fact that the Minister subsequently went back on that position, *c.* the principle of mutual recognition on which the EAW Framework Decision is based is not compatible with the aforementioned obligation, at any rate not in an unqualified form, and *d.* numerous other Member States do not set the requirement of submission of the texts of the applicable statutory provisions either.

The Dutch Supreme Court put forward arguments, clear and convincing in themselves against the District Court's opinion. What is missing in the judgment, however, is that the underlying issue – concerning what review framework is available to the national courts in surrender cases – is placed in a broader context. In the light of the Kozłowski case, the central question should be whether a uniform and autonomous interpretation of Article 8(1)(d) of the EAW Framework Decision entails an obligation for the issuing Member State to submit the texts of the applicable statutory provisions.

If my view is correct, no obligation can be read in Article 8(1)(d) of the EAW Framework Decision to submit the texts of the applicable statutory provisions. This is not the case first of all because neither the texts of those provisions nor the model EAW indicates the existence of such an obligation. Furthermore, it could be formulated as the rationale of Article 8(1)(d) of the EAW Framework Decision that the model EAW enables the executing Member State to judge whether a mandatory or optional ground for non-execution exists. These are issues such as amnesty, *ne bis in idem*, prescription and territoriality (Articles 3 and 4 of the EAW Framework Decision). For that judgment, mainly an adequate description of the circumstances under which the offence was committed is important and, to a lesser extent, the nature and legal classification of that offence. One could ask oneself what the added value is in this context of setting out – let alone submitting – the applicable statutory provisions. Strictly speaking, the executing Member States do not need them to determine whether there is a ground for non-execution.

Could an obligation to submit the texts of the applicable statutory provisions perhaps be derived from Article 2 of the EAW Framework Decision, which pertains to being able to review or not or setting the requirement of double punishability? If one has to do with an offence listed in the EAW, this offence 'as defined by

the laws of the issuing Member State' must come under one of the categories of offences listed in Article 2(2). It is logical for the issuing Member State to decide whether that is the case, given the explicit reference to the right of the issuing Member State. If a non-listed offence is concerned, the model EAW requires 'full descriptions of the offence(s)'. Those descriptions must be adequate in order to enable the executing Member State to determine whether the offence for which the EAW was issued constitutes an offence under the law of the executing Member State. In that approach, submission of the texts of the provisions is not a necessary, standard requirement.

The question remains whether the executing Member State must have the texts of the applicable statutory provisions of the issuing Member State to be able to check whether the offence to which the EAW relates carries the maximum sentence as provided in Article 2(1) and (2) of the EAW Framework Decision. The question preceding this is whether the executing Member State is entitled to check this, and the purpose and tenor of the EAW Framework Decision are relevant to this. The EAW Framework Decision introduced a surrender system based on the principle of mutual recognition. This gives that system a largely mandatory nature. Surrender is the rule, and non-surrender is possible only on the basis of the limitative grounds for non-execution included in the framework decision. Although it is stated in the preamble of the framework decision that decisions on execution of the EAW may be taken only after they have been subjected to sufficient controls, at the same time, the framework decision is based on a high degree of trust between the Member States. In this approach, trust is not a result, but rather the standard point of departure for cooperation, as is evident from the Gözütok & Brügge case law. Different opinions can be formed on the answer to the question whether mutual trust can actually be created by imposing legal rules. This does not affect the fact that it is not appropriate for a system based on mutual recognition and mutual trust for an executing Member State to systematically check the work of the issuing Member State.[16]

All in all, an autonomous and uniform interpretation of Article 8(1)(d) of the EAW Framework Decision does not seem to leave room for assuming an obligation

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[16] Klip, 2009, pp. 339. See on this issue also J. Ginter, 'The content of a European Arrest Warrant', in N. Keijzer & E. van Sliedregt (eds.), *The European Arrest Warrant*, The Hague: T.M.C. Asser Press 2009, pp. 8–10. Ginter argues that providing the full text of the articles containing the legal classification of the offence in a European Arrest Warrant in view of Article 5 of the European Convention on Human Rights. However, the European Court of Human Rights requires that the arrested person must be informed (in non-technical language) on the essential legal grounds for his arrest. This not stipulated, by definition, the obligation to submit the texts of the applicable statutory provisions.

to submit the texts of the applicable statutory provisions. If such a requirement were set nevertheless, an unacceptable broader interpretation would be used.

## 7. Conclusion and Outlook

At the beginning of this article, I stated that when framework decisions are drafted which relate to cooperation between the Member States in criminal matters, the principle of mutual recognition is not always used as a mandatory guideline. When framework decisions are implemented at national level, the national rules may be drafted in such a way that the obligation to cooperate is less effective or mandatory than would be the case on the basis of a framework decision, in view of the principle of mutual recognition. Against this backdrop, the ECJ fulfils a role that cannot be underestimated. It is clear that the ECJ considers the principle of mutual recognition of paramount importance. This principle is therefore an important if not the most important guideline for giving a uniform and autonomous interpretation of provisions of European law. Because the ECJ is the pre-eminent authority to interpret European law, this working method also has a consequential effect on national courts. National courts may also be expected to search for the uniform and autonomous meaning of terms in framework decisions in complying with their obligation to interpret national law in conformity with framework decisions, and to give particular weight to the principle of mutual recognition in doing so.

To what extent will the Treaty of Lisbon change this state of affairs? It can be noted first of all that all existing framework decisions will remain in effect.[17] Subsequently, albeit after some years have passed,[18] the restrictions in the jurisdiction of the ECJ as they apply pursuant to Article 35 EU Treaty will cease to exist and make room for the powers of the ECJ in Article 259 et seq. of the Treaty on the Functioning of the European Union. This means for example that the restrictions set in Article 35 EU Treaty on requests for preliminary rulings will cease to exist. All national courts will have the competence – and the highest national courts the obligation – to request preliminary rulings if they are necessary in order to give judgment in national proceedings. This will most likely entail an increase in the number of requests for preliminary rulings on the interpretation of framework decisions (and other legal instruments) relating to mutual recognition.

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17) Protocol (No 36) on transitional provisions, Article 9.

18) According to Protocol (No 36) on transitional provisions, Article 10, this transitional measure shall cease to have effect five years after the date of entry into force of the Treaty of Lisbon. Furthermore, the amendment of a framework decision shall entail the applicability of the powers of the Court of Justice as set out in the Treaty on the Functioning of the European Union with respect to this amended framework decision.

Another important issue is the competence of the European Union to determine measures pertaining to mutual recognition in criminal matters. The legal instrument for this purpose will no longer be the framework decision, but the directive. If one considers the legal principles of Articles 82 and 83 of the Treaty on the operation of the European Union, it appears that harmonisation of legislation will be carried out first and foremost to enable effective and efficient cooperation between the Member States in criminal matters. In this respect, the principle of mutual recognition is misleading. This will continue a development that has already been in progress for some time: the shift of attention more and more from harmonisation of substantive criminal law and the law of criminal procedure of the Member States to harmonisation with a view to cooperation in criminal matters.[19] The recent Stockholm Programme confirms that this development has by no means come to an end. According to this Programme, the principle of mutual recognition should extend to *all* types of court decisions and judgments – civil, criminal or administrative. Various proposals are made in that context to expand the current legislation in this area.[20]

Let there be no misunderstanding, therefore, that the Treaty of Lisbon, owing to the reinforcement of the rules on preliminary rulings as well as the prominent position given to the principle of mutual recognition in criminal matters, entails that national courts will have to take increasingly more account of the meaning of that principle in the interpretation of national rules having their origin in European law in the area of cooperation in criminal matters.

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19) M.J. Borgers, 'Functions and aims of harmonisation after the Lisbon Treaty: a European perspective', in C. Fijnaut & J. Ouwerkerk (eds.), *The Future of Police and Judicial Cooperation in the European Union*, Martinus Nijhoff, Leiden, 2010.

20) Council Document 14449/09.